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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 774

UNITED STATES OF AMERICA for the use and benefit of J. A. EDWARDS & CO., INC.,

Petitioner,

—against—

THE THOMPSON CONSTRUCTION CORP. and STANDARD ACCIDENT INSURANCE COMPANY,

Respondents,

and

BEN B. GREENE, INC.,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Reasons for Denying the Writ

I.

This Court clearly held in the case of *Fleisher Engineering & Construction Company,* et al. v. *United States of America for the Use and Benefit of George S. Hallenbeck,* etc., 311 US 15 (1940), that notice under Section 270 (b) of Title 40, U.S. Code, was a condition precedent to the right of one not in privity

with the general contractor to sue on the Miller Act bond. This Court further pointed out that "compliance with the prescribed limitation was essential to the assertion of the right conferred".

To the same effect was the case of *Bowden* v. *United States of America for the use of Emmet J. Molloy*, 239 F. 2d 572 (9th Cir. 1956), Cert. Den. 353 U.S. 957 (1957), wherein the facts were most similar to the facts in the case at bar. The plaintiff therein was also a supplier of a subcontractor to the general contractor and the purported Miller Act notice relied upon was a letter from the subcontractor to the general contractor in which it was stated that the plaintiff-supplier was owed a sum of money greater than the amount eventually sued for by the plaintiff. The United States Court of Appeals there held that this was not proper notice, primarily because the notice came from the subcontractor and not from the supplier. The Court's holding was based on the principle that liberal construction of a remedial statute does not justify reading out of the statute the very construction that Congress and the precise wording of the statute itself clearly requires as a condition precedent to a right of action on the Miller Act bond. The *Bowden* case, supra, has been followed in the United States Court of Appeals for the Third Circuit in *United States for the Use of Old Dominion Iron & Steel Corp.* v. *Massachusetts Bonding and Insurance Company*, 272 F. 2d 73.

The purported Miller Act notice in the case at bar (21a) is also a letter from the subcontractor (Ben B. Greene, Inc.), and not from the petitioner, to the general contractor (The Thompson Construction Corp.).

Thus it would seem that the *Bowden* case, supra, and the *Old Dominion Iron & Steel Corp.* case, supra, are controlling.

Nor is there any merit in the petitioner's argument that the purported letter notice was signed by Greene at petitioner's request since nothing in that letter gave respondent, The Thompson Construction Corp. any reason to think that a direct claim was being made against it on the Miller Act bond. That Congress intended the interpretation of the Miller Act as stated in the *Bowden* case, supra, the *Old Dominion Iron & Steel Corp.* case, supra, as well as the decision in the instant case in the Courts below, is evident from H. Rep. Report No. 1263 and Senate Report No. 1238 (74th Congress, First Session).

II.

In the case of *United States, for Use of Bruce Co., Inc.* v. *Fraser Construction Co.*, et al., 87 F. Supp. 1 (W. D. Ark. 1949) it was held that the Miller Act notice must amount to a "presentation of a claim" and the form and manner of presentation must be such as to so advise the contractor furnishing the bond, and this holding is completely consistent with the holding in the *Fleisher* case, supra. In the case at bar, the basic statutory requirement of the presentation of a claim, was not met by the letter of January 9, 1957 (21a).

In its petition the petitioner erroneously states that the purported letter notice (21a) was an assignment. However, a reading of this purported statutory notice

clearly indicates that it was a mere *request* by Greene for *approval* of an assignment of moneys allegedly due Greene from The Thompson Construction Corp. on this general contract. It is also apparent from reading the said purported notice that the amount of money in the first paragraph of said letter in no way has any relation to the amount sued for, but it is a mere coincidence that the amount is approximately the same as the amount in issue. Incidentally Paragraph 27 of the subcontract between Ben B. Greene Inc. and The Thompson Construction Corp. (Exhibit 2) states in no uncertain terms that any attempted assignment without the written approval of Thompson is invalid. Therefore, since the letter is not an assignment, the case of *Sillman* v. *Twentieth Century Fox Film Corporation*, 3 N. Y. 2d 395 (1957) cited by the petitioner is inapplicable. Thus petitioner's statement on page 11 of its petition that said letter "impelled contractor to withhold money," is erroneous. Furthermore, petitioner's statement on page 6 of the petition that no further payments were made to Greene as a direct result of the January 9, 1957, letter has no basis whatsoever in the record.

The respondents are compelled to point out that the petitioner on page 5 of its petition erroneously states that respondent, The Thompson Construction Corp. knew that Greene was in financial difficulty with his materialmen. However, the record is clear that this alleged knowledge was merely because of a check jointly payable to Greene and another electrical supplier (16a). The petitioner then goes on to state on page 5 of its petition that the ~~check~~s payable jointly to Greene and the petitioner were to prevent diversion of payments by Greene. This erroneous conclusion

is completely refuted by the testimony that said payment arrangement was made solely at the request of Greene. (17a)

III.

The respondents do not dispute that the Miller Act is a remedial statute and should be liberally construed and so petitioner's cases cited for this contention are inapposite. In the cases of *Moyer*, et al., v. *United States for the Use of Trane Co.*, et al., 206 F. 2d 57 (4th Cir., 1953), *United States for Use of Birmingham Slag Co.* v. *Perry*, et al., 115 F. 2d 724 (5th Cir., 1940), *Standard Accident Insurance Company*, v. *U. S. for the Use and Benefit of Powell*, 302 U. S. 442 (1938), *Brogan* v. *National Surety Co.*, 246 U. S. 257 (1918), *Illinois Surety Company* v. *John Davis Co.*, 244 U. S. 376 (1917), do not involve the question of notice at all, which is the very issue in the case at bar. *Houston Fire & Casualty Insurance Co.* v. *United States for the Use and Benefit of the Trane Co.*, 217 F. 2d 727 (5th Cir. 1954), *United States of America, for the Use and Benefit of Hopper Bros. Quarries* v. *Peerless Casualty Company, et al.*, 255 F. 2d 137 (8th Cir. 1958) and *McWaters and Bartlett, et al.* v. *United States of America, for the use and benefit of Wilson*, 272 F. 2d 291 (10th Cir. 1959) do not support petitioner's argument in any way since in those cases the "nature and state of the indebtedness" was made known to the general contractor. A case more in point with the instant case is *United States for the Use and Benefit of American Radiator & Standard Sanitary Corporation* v.

Northwestern Engineering Co., et al., 122 F. 2d 600 (8th Cir. 1941), where the Court held that notice from the supplier itself was a condition precedent to the existence of a right of action on the bond.

Research has failed to disclose any case under the Miller Act requiring the exercise of imagination or the necessity for further inquiry on the part of a general contractor, as suggested by the petitioner. From the *Fleisher* case, supra, as well as the wording of the statute itself, it would seem that this is exactly what the statute was attempting to avoid.

Inasmuch as the case of *United States of America for the Use and Benefit of J. A. Edwards & Co., Inc.* v. *Peter Reiss Construction Co. Inc. et al.*, — F. 2d — (2nd Cir. 1959) (writ of certiorari applied for) does not involve the question of the quality of the Miller Act notice, but only the timeliness thereof, the attempt to join that case with the within case is improper. Finally, to characterize the Miller Act as a "trap for the unwary" because of the decision below, is hardly consonant with the facts when, as indicated in the *Bowden* and *Old Dominion Iron & Steel Corp.* cases, supra, a mere written notice from the petitioner to the general contractor simply stating that a subcontractor, Ben B. Greene, Inc., of the general contractor owed petitioner moneys in connection with the general contractor's project would be sufficient.

Conclusion

Inasmuch as the decision below neither conflicts with decisions of this Court nor with the decisions of the United States Courts of Appeals for other circuits, as well as for the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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